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IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-1657

F. H. McGRAW AND COMPANY, Bankrupt,
Petitioner,

v.

FELLOWS CORPORATION, Formerly Known as the FELLOWS GEAR SHAPER COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

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OCTOBER TERM, 1972.

No. .

F. H. McGRAW AND COMPANY, BANKRUPT,
Petitioner,

v.

FELLOWS CORPORATION, FORMERLY KNOWN AS THE FELLOWS GEAR SHAPER COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Your petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled case on March 21, 1973.

OPINIONS BELOW.

The Opinion of the Court below (Appendix, *infra* A1), is reported as 473 F. 2d 465 (3d Cir. 1973). The Opinion of the District Court is reported as — F. Supp. — (Appendix, *infra* A12).

JURISDICTION.

The decision of the court below was entered on February 9, 1973. Rehearing was denied on March 13, 1973 and judgment entered on March 21, 1973. This Petition was filed within 90 days from the date on which rehearing was denied. The jurisdiction of this Court is invoked under 11 USC 47(c) and 12 USC 1254(1).

QUESTIONS PRESENTED.

1. Should the Referee's findings of fact, made after hearing testimony on a claim against the estate, affirmed by the Judge of the District Court,

(a) Be set aside by a majority of the Circuit Court where the findings of fact are not "clearly erroneous",

(b) Should the Circuit Court, by a split decision, make contrary findings as if the case on appeal was before it *de novo*?

2. Will the decision of the Circuit Court, reversing a Referee's findings of fact affirmed by the District Court, which are not "clearly erroneous", likely result in unnecessary and unwarranted appeals in this circuit unless corrected?

3. Should the Referee's finding of the intention of the parties to a Consent Decree, based upon conflicting testimony and the facts set forth in the Petition accompanying the Order, affirmed by the District Court, be set aside by the Circuit Court?

4. Where three judges, namely the Referee of the Bankruptcy Court, the Judge of the District Court, and one of the Judges of the Circuit Court, make or affirm findings of fact which by law are presumptively correct, should two judges, comprising a majority of the Circuit Court, review the case *de novo* and make contrary findings.

STATUTES INVOLVED.

1. Section 24 of the Bankruptcy Act, as amended, 11 U. S. C. § 47, as it relates to Jurisdiction of Appellate Courts, provide:

(a) "The United States Court of Appeals, in vacation, in chambers, and during their respective terms, as now or as they may be hereafter held, are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact."

2. Rule 52 of the Federal Rules of Civil Procedure, 28 U. S. C. § 52, as it relates to Findings of Fact, provides:

"Rule 52. *Findings by the Court*

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions

of law are unnecessary on decisions of motions under Rules 12 or 56 or any other other motion except as provided in Rule 41(b).

(b) *Amendment.* Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963."

3. No. 47 of the General Orders in Bankruptcy, adopted Nov. 28, 1895, provides:

"Order 47. *Reports of Referees and Special Masters* Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of law, and the judge shall accept his findings of fact unless clearly erroneous. The judge after hearing may adopt the report or may modify it or may recommit it with instructions.

Added May 31, 1932, amended Apr. 17, 1933; June 1, 1936; Jan. 16, 1939."

STATEMENT.

On December 12, 1968, F. H. McGraw Company (McGraw), a building contractor, filed a Petition for an Arrangement under Chapter XI of the Bankruptcy Act, and Philip F. Newman was appointed Receiver for the debtor corporation. McGraw was adjudicated a bankrupt on February 6, 1970, and Mr. Newman was appointed Trustee in Bankruptcy.

In the course of its business, McGraw entered into a $5,165,851.00 contract to construct a plant for the claimant, Fellows Gear Shaper Company (Fellows), which it had 55% completed when the Petition was filed. Fellows completed the plant by agreement at a loss in excess of a million dollars and filed a claim against the bankrupt estate in that amount. The Trustee defended that Fellows agreed to complete the construction without liability to the estate. The Referee, the District Court and one of the three judges of the Circuit Court so found, but the remaining two judges of the Circuit Court disagreed and reversed.

When McGraw filed the Chapter XI proceeding, Fellows was anxious to get its plant completed as soon as possible and asked the Receiver to obtain court approval for debtor to waive its right to complete the construction. Fellows also estimated that this could be done for as much as $80,000.00 less than the balance due on the contract. If approval was obtained, Fellows offered to take over and complete the construction and turn over the profit on the job to the receiver. After considerable discussion and correspondence, the Receiver accepted the proposal of Fellows. Counsel for Fellows and counsel for the Receiver then collaborated by mail in the preparation of a form of Petition to be presented to the Bankruptcy Court to obtain the necessary approval of the waiver by the Receiver of his right to complete the construction and of his assignment of the

sub-contracts to Fellows. Counsel for the Receiver presented the Petition to the Bankruptcy Court and the Court approved the Petition and entered the Order attached to the Petition on January 21, 1969. The Order[1] entered by the Bankruptcy Court contained, inter alia, the following provision:

> "And It Is Further Ordered and Decreed that Philip F. Newman, Esq., Receiver herein, shall not be liable for any claim for deficiency if the cost of completion of the contract exceeds the balance of the contract price."

A certified copy of the Petition and Order containing the above quoted paragraph was mailed to counsel for Fellows on January 21, 1969. Three days later, on January 24, 1969, counsel for Fellows addressed a letter to the counsel for the Receiver acknowledging receipt of the copy of the Petition and Order and requesting the Receiver to implement the terms of the Order by executing and delivering the necessary assignments to enable Fellows to proceed with the completion of the construction. During the ten day period provided under the Bankruptcy Act [11 U. S. C. § 67(c)] Fellows filed no objection to the Order and made no attempt to seek either modification or review of the Order.

After completion of the building, Fellows filed a claim in the bankruptcy proceedings in the amount of $1,092,251.01 asserting that the cost of completion exceeded the balance of the contract price by that amount. An objection was filed to the claim upon the ground that Fellows had agreed to waive any claim for a deficiency as evidenced by and as provided by the terms of the above quoted paragraph of the Order entered January 21, 1969, by the Bankruptcy Court.

1. The Order in its entirety is quoted in the majority opinion of the Court of Appeals, A4 and A5, *infra*.

After a full hearing, at which both counsel for Fellows and counsel for the Receiver testified, the Referee in Bankruptcy dismissed the claim of Fellows and made findings of fact which included the following:

> "5. Upon receipt of notice of the Chapter XI proceedings, Fellows, by its counsel, Alban J. Parker, Esq., requested the Receiver, by his counsel, Alexander B. Adelman, Esq., to (a) petition the Court to approve a release of Debtor's right to complete the contract; (b) assign to Fellows Debtor's subcontracts with its laborers and materialmen; and (c) waive the Debtor's rights under the 30-day notice clause of default so that construction could proceed expeditiously.
>
> 6. The Receiver agreed to file said Petition upon the consideration that the Debtor would not be liable for any deficit with respect to the completion of said contract and that the Debtor would benefit to the extent that profit resulted therefrom."

Based upon his findings of fact, the Honorable Thomas J. Curtin, the Referee, dismissed Fellows' claim. When the case came before the Honorable Alfred L. Luongo, Judge of the District Court, he held "The Referee's findings have ample support . . ." and affirmed the decision of the Referee.

The Court of Appeals, on February 9, 1973, in a majority opinion by the Honorable Ruggero J. Aldisert, concurred in by the Honorable John J. Gibbons, without any finding that the facts found by the Referee and affirmed by the District Court were "clearly erroneous", reversed and remanded the case with directions to allow the Fellows' claim.

The Honorable Arlin M. Adams wrote a dissenting opinion in which he stated that the result reached by the

Referee and affirmed by the District Court was an "eminently reasonable" interpretation of the "release" and that the majority viewed the case as if it was before the Circuit Court de novo.

A timely Petition for a rehearing, filed by Petitioner, was denied on March 13, 1973 and judgment issued on March 21, 1973.

REASONS FOR GRANTING THE WRIT.

1. The decision in this case is in direct conflict with prior decisions of the Court of Appeals for the Third Circuit dating from *Epstein v. Steinfeld*, 210 F. 236 (3rd Cir. 1914),[2] as well as many other circuits which hold that the Referee's findings of fact, affirmed by the District Court, are binding and simply will not be set aside except in most unusual circumstances.[3] There has been a tendency on the part of some Appellate Courts to erode this well established rule by substituting its fact findings for those of the Referee even when affirmed by the District Court. This should be discouraged.

In order to prevent uncertainty, and possibly a veritable avalanche of appeals on questions of fact, in an area

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2. *In re Wolf*, 165 F. 2nd 707 (3d Cir. 1948); *In re Arbycraft Co.*, 288 F. 2d 533 (3rd Cir. 1961); *In re Steiker*, 380 F. 2d 765 (3rd Cir. 1967).

3. We quote briefly from the following cases (Emphasis supplied):

Arbycraft, supra, at page 557: ". . . If there is a reasonable basis in the record for a Referee's ultimate finding of fact, *a reviewing court cannot reverse it and substitute its own ultimate factfinding simply because it regards its view as effecting a more desirable result than that reached by the Referee.*"

Cedar-Comp Materials Co. v. Bumb, 344 F. 2d 256 (1965), at pages 258, 259: "Clearly there was substantial evidence to support the finding . . . *under General Order 47 this court must accept the finding . . . unless 'clearly erroneous'.*"

In re Panama Airways, Inc., 429 F. 2d 646 (1970), at page 648: "*We start with the proposition that application of the clearly erroneous doctrine becomes paramount* when, as here, the District Court has approved the Referee's determination."

Union Bank v. Blum, 460 F. 2d 197 (1972), at page 202: "Since the Referee's findings were affirmed by District Court, we proceed to review them applying clearly erroneous standard . . ."

In re Souder, 449 F. 2d 284, 286 (1971): "*The findings of the Referee in bankruptcy were supported by the evidence and therefore should not be set aside* even though we may have reached a different result if we had been sitting as the finder of fact."

that has been settled so long, it is submitted that the Writ of Certiorari should be granted and the cause remanded to the Circuit Court of Appeals for the Third Circuit en banc. See *U. S. ex rel. Robinson v. Johnston*, 316 U. S. 649, 62 SCT 1301 (1942).

2. The Circuit Court erred because it ignored the "clearly erroneous" rule and decided the basic question of fact involved in this case as if it was before it de novo. The Court then made findings which were contrary to the findings of fact made by the Referee and approved by the District Court Judge. This was contrary to Section 47 of the General Orders in Bankruptcy adopted by the Supreme Court of the United States, as amended May 29, 1961, which clothe the Referee's findings with a presumption of correctness. Section 47 provides:

> "Unless otherwise directed in the order of reference the report of a referee or of a special master shall set forth his findings of fact and conclusions of the law, and *the judge shall accept his findings of fact unless clearly erroneous.* The judge after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." (Emphasis supplied.)

And, as the dissenting judge pointed out, an Order of a Referee, based on conflicting evidence, affirmed by the District Court,

> ". . . should not be disturbed upon review by the district judge unless clearly erroneous. *Upon appeal to the circuit court of appeals this presumption of correctness is strengthened where the district judge has approved such findings,* and they will be accepted unless a mistake is clearly shown, 3 Collier on Bank-

ruptcy, sec. 57.14(5), p. 219-20 (14th ed.)." (Emphasis supplied.)

Instead of making independent findings, the Circuit Court, therefore, should have reviewed the record to determine whether the Referee's findings were "clearly erroneous". It was not its duty to try the case de novo.

Not any of the judges who sat on this case found that either the Referee's decision or his findings of fact were "clearly erroneous". On the contrary, we submit, that as Judge Luongo held at page 80a,

> "The Referee's findings have ample support and his legal conclusions are sound."

And, as Judge Adams stated at page 10 of the dissenting Opinion,

> ". . . the result reached by the referee is an eminently reasonable interpretation of the provision of the order, or release, in question . . ."

The decision of the Circuit Court, therefore, should not be permitted to stand.

3. The majority of the Circuit Court held that the "release" provision of the Order appended to the Petition was ambiguous. It provided specifically (56a):

> "And it is Further Ordered and Decreed that Philip F. Newman, Receiver herein, shall not be liable for any claim *for deficiency if the costs of completion of the contract exceed the balance of the contract price.*" (Emphasis supplied.)

There was, of course, a deficiency but the majority held that it was not clear whether the Order was intended to release the Receiver personally for some unexplained liability or to release the estate for whom the Receiver

was plainly acting. Basing its decision on the fact that the release referred to "Philip F. Newman, Receiver herein," and evidently on the strange testimony of Fellows' then counsel, the majority held that it was the Receiver, personally, who was released. The majority does not say, however, what the receiver was released from since he was under no personal liability for the completion of the plant which was taken over by Fellows.

The testimony of Fellows' counsel seems strange because he said, at pages 36a and 37a, that he regarded the provision in question as releasing only a claim against the receiver personally for costs of administration. As Judge Adams stated in his dissenting opinion at page 79a, this testimony was "not persuasive," and it is not the least surprising that the Referee did not accept it.

It is surprising that the majority ignored the testimony of counsel for the Receiver, the facts set forth in the Verified Petition and the finding of the Referee who signed the Order. The Receiver's counsel testified that, at Fellows' request, he released the right of the estate to complete the contract to Fellows, and although it was contemplated that there would be a profit of possibly $80,000.00 (24a), the release provision was inserted to be "careful" (30a). Certainly, the exercise of care, like the expectation of a profit of $80,000.00 was for the benefit of the estate and not for the personal benefit of the Receiver.

It is doubtful if there was any ambiguity in the Order, but if there was its interpretation in view of the conflicting testimony and the facts set forth in the Petition was for the Referee and not for the Circuit Court of Appeals.

4. The majority of the Court erred in construing the release language contained in the Referee's Order as solely a contract between the parties whereas the Order

of the Referee was an Order of the Bankruptcy Court which extinguished the claim of Fellows "for any claim of deficiency if the costs of completion of the contract exceed the balance of the contract price". This distinction was pointed out with considerable clarity in *Zampetti v. Cavanaugh,* 406 Pa. 259 (1962) where the court stated at page 265:

> "Although a consent decree is not a legal determination by the court of the matters in controversy, *Universal Builders Supply, Inc. v. Shaler Highlands Corp.,* 405 Pa. 259, 265, 175 A. 2d 58 (1961), it binds *the parties* with the same force and effect as if a final decree has been rendered after a full hearing upon the merits, *Baran v. Baran,* 166 Pa. Superior Ct. 532, 537, 72 A. 2d 623 (1950). The fact that without the consent of the parties the court might not have rendered the judgment does not affect its effect as res judicata. Annot. 2 A. L. R. 2d 514, 528 (1948). Were this not so, a consent decree would have little value."

Even if the Decree be regarded as a contract of the parties, it is well established that evidence of preliminary negotiations is admissible. We quote from *Williston on Contracts,* Third Edition (1960), Section 630, at page 942:

> "The preliminary negotiations incident to the execution of an integrated agreement of uncertain meaning are admissible for the purpose of ascertaining the intentions of the parties, the conditions present when the writing was made, and the purposes intended to be accomplished."

Also, where an ambiguity exists, oral testimony of the surrounding circumstances are admissible, see *Williston, supra,* Section 629, at pages 920, 921:

"Where there is no ambiguity in the contract, . . . it must speak for itself, . . . *Where such ambiguity does exist, then evidence of the circumstances under which the contract was made is proper to enable the court, in the light thereof, to read the instrument in the sense the parties intended, if that can be done without violence to the rules of language or of law.*" (Emphasis supplied.)

Oral testimony was introduced at the hearing before the Referee in this case which was conflicting. The intention of the parties thereupon became a question of fact for the Referee; certainly not for the Circuit Court of Appeals.

CONCLUSION.

Three judges, namely the Referee of the Bankruptcy Court, the Judge of the District Court and one of the three judges of the Circuit Court who heard the appeal, all agreed upon the findings of fact made in this case. It is Petitioner's contention that these findings can, in such circumstances, hardly be said to be "clearly erroneous" and, therefore, Certiorari should be granted.

Respectfully submitted,

NATHAN LAVINE,
ADELMAN AND LAVINE,
Counsel for Petitioner.

Appendix.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 71-1900

IN THE MATTER OF F. H. McGRAW & COMPANY,
Bankrupt

FELLOWS CORPORATION, CLAIMANT,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Submitted November 17, 1972

Before: ALDISERT, ADAMS, and GIBBONS, *Circuit Judges.*

OPINION OF THE COURT

(Filed Feb. 9, 1973)

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NATHAN LAVINE, ESQ.,
Philadelphia, Pa.,
Attorney for Appellee.

PHILIP F. NEWMAN, ESQ.,
Trustee in Bankruptcy.

ALDISERT, *J.*

This appeal from the district court's affirmance of an order of the referee in bankruptcy disallowing appellant's proof of claim, presents the question whether the referee erred in concluding that his order constituted a binding release of a subsequent claim.

F. H. McGraw & Co., general contractor for the construction of a five million dollar manufacturing plant for Fellows Corp. in Springfield, Vermont, filed a Chapter XI Petition in bankruptcy and a receiver was appointed. In order to prevent job delay and weather damage, Fellows elected to complete the construction itself by assuming the responsibility for paying subcontractors and materialmen. After its counsel obtained the receiver's consent to such an arrangement, the receiver suggested that the parties utilize a petition and order form similar to an arrangement previously entered into between the receiver and another corporation. After examination of the submitted form, Fellows consented to the form of the petition and order, and authorized the receiver to proceed. The receiver made the presentation to the referee by petition and proposed order.

The petition and order approved by the referee provided for waiver of certain notice provisions of the original construction contract and payment of materialmen and subcontractors by Fellows. Additionally, the order contained the following paragraph not contained in the model order agreed to by Fellows:

> AND IT IS FURTHER ORDERED AND DEC[illegible] that Philip F. Newman, Receiver herein, shall [illegible]e liable for any claim for deficiency if the cos[illegible] of completion of the contract exceed the balance o[illegible]ne contract price.

This litigation centers around th[illegible] additional language. At the time the order was entered, both Fellows and the

receiver anticipated that the contract would be completed at a profit. However, according to Fellows' proof of claim, the cost of completion exceeded the contract price by $1,092,251.01, an amount which Fellows seeks to assert as an unsecured claim in the bankruptcy proceedings.

Interpreting the above quoted portion of his order, the referee ruled that "[t]he Receiver was relieved of liability by the agreement, waived his contractual rights and Fellows is estopped to deny the plain meaning of the release."[1] Although it is uncontradicted that the parties did not discuss the language in question prior to its inclusion in the referee's order, and that it was included therein only by the ex parte action of the receiver, the referee ruled that "the only reasonable meaning that can be given to the release language is that the release inured to the benefit of the Trustee following adjudication." The district court affirmed.

Central to our review are certain elementary principles of the law of contracts. It is hornbook law that a release covers only such matters as were within the contemplation

1. The referee ruled that "the plain meaning of the release" relieved the receiver of liability. In so ruling the referee made it clear that he was interpreting his own order without reference to the intention or expectancies of the parties. Counsel for Fellows was asked what the provision meant to him when he read the order. After questioning the relevance of counsel's interpretation, the referee admitted the interpretation with the observation: "It doesn't make that much difference, I still have the determination. . . ." Although counsel for the receiver objected late to the admission of the interpretation placed upon the order by counsel for Fellows as irrelevant, the referee permitted the witness to continue, saying, "It is the same principle. I am still going to make the determination, not the witness." This colloquy indicates that although the interpretation of Fellows' counsel was received as evidence, it was not considered by the referee in his interpretation of the order and thus "[i]t is the same" as excluding the interpretation.

We cannot agree with the interpretation placed upon the provision by the referee. If the provision is to be construed as a release, we view as relevant the circumstances leading up to the release. *Eulo v. Deval Aerodynamics, Inc.*, 430 F. 2d 325, 329 (3d Cir. 1970).

of the parties at the time the contract was entered into. There being no express contract before him, the referee found one implied in fact: that inaction by Fellows after it had notice of the language introduced ex parte by the receiver constituted an acquiescence, and thereby an acceptance, resulting in a valid contract. Although we agree that Fellows is estopped to attack the technical validity of the provision because it was not timely objected to, we reject the referee's interpretation of that provision.

We are not persuaded that there is only "one reasonable meaning that can be given to the release language." First, we compare the language of the disputed provision with other provisions contained therein.[2] Throughout the

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2.

ORDER.

AND NOW, to wit, this 21 day of January, 1969, upon consideration of the foregoing petition and affidavit, the joinder of the Debtor, good cause having been shown and upon motion of Samuel Marx, Esq., and Adelman & Lavine, Esqs., counsel for the Receiver, It is

ORDERED AND DECREED that PHILIP F. NEWMAN, Receiver herein, be and he is hereby authorized to allow The Fellows Gear Shaper Company to pay any subcontractors and material suppliers of F. H. McGraw & Co., the Debtor, directly so as to assure their continuance on the job pursuant to contract entered into between The Fellows Gear Shaper Company and the Debtor dated August 9, 1968, in the amount of $5,165,851.00, and to

(a) Authorize continued reimbursable payment by The Fellows Gear Shaper Company to McGraw "on site" employees, until termination of the construction contract.

(b) Authorize direct payments by The Fellows Gear Shaper Company to all subcontractors and material suppliers of McGraw on the Fellows facility up to the time of termination of the construction contract between McGraw and Fellows.

(c) Authorize Fellows to assume all rights and to make such payments as Fellows deems desirable to subcontractors and material suppliers of amounts due from McGraw under any subcontracts or purchase orders in effect at the time of termination of the construction contract.

order reference is continuously and repeatedly made to "McGraw." The receiver was empowered to "Authorize . . . payment . . . to McGraw . . . employees;" to "Authorize direct payments . . . to all subcontractors and material suppliers of McGraw;" to "Authorize assignment by McGraw . . .;" to "Authorize . . . waiver[s] by McGraw," etc. By comparison, in that portion of the order in dispute, the name "McGraw" is not used; instead, it relates, "Philip F. Newman, Receiver herein, shall not be liable" for the cost of completion of the contract should the cost of completion exceed the contract price. Any ambiguity resulting from this deliberate choice of language will be interpreted most strongly against the party who wrote it, in this case, the receiver. Williston, Selections on Contracts, Student Edition, § 621; Restatement, Contracts, § 236.

We find such an ambiguity. The language has the capacity of being interpreted as releasing the named receiver, and thereafter a trustee, from accepting any claim as a debt having priority as "actual and necessary costs

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(d) Authorize assignment by McGraw to Fellows, or party or parties designated by Fellows, of all outstanding subcontracts, purchase orders, and agreements entered into in connection with construction of the Fellows facility.

(e) Authorize the waiver by McGraw of the seven (7) day notice period required under the contract termination provisions of the construction contract between Fellows and McGraw.

(f) Authorize the waiver by McGraw of the thirty (30) day notice period required under the default provisions of the Agreement between McGraw and Fellows dated July 29, 1968.

AND IT IS FURTHER ORDERED AND DECREED that Philip F. Newman, Receiver herein, shall not be liable for any claim for deficiency if the costs of completion of the contract exceed the balance of the contract price.

s/ THOMAS J. CURTIN
Referee in Bankruptcy

and expenses of preserving the estate subsequent to filing the petition." 11 U. S. C. § 104(a)(1). *In re Connecticut Motor Lines, Inc.*, 336 F. 2d 96 (3d Cir. 1964). While we do not agree with an alternative interpretation of the provision as releasing the receiver from personal liability only, we do note that in *In re I. J. Knight Realty Corp.*, 370 F. 2d 624 (3d Cir. 1967), rev'd. on other grounds, sub nom., *Reading Co. v. Brown*, 391 U. S. 471 (1968), we indicated that a receiver could be surcharged for excessive costs. In interpreting the provision, the referee could have considered whether the language could have been so interpreted.

Under the circumstances herein presented—where there is no evidence of prior discussion between Fellows and the receiver as to the inclusion of this language, let alone the drastic consequences flowing therefrom now urged upon this court—we are unwilling to attribute to this language the full force and effect of a bar to claims not matured or accrued at the time of the writing.

Although posited in another context, we are impressed by the approach of the Pennsylvania Supreme Court, speaking through Justice Roberts, in *Restifo v. McDonald*, 424 Pa. 644, 230 A. 2d 199, 201 (1967):

> A long line of Pennsylvania cases has held that a release covers only those matters which may be fairly said to have been within the contemplation of the parties when the release was given. See, e.g., Wenger v. Ziegler, 424 Pa. 268, 226 A. 2d 653 (1967); Brill's Estate, 337 Pa. 525, 12 A. 2d 50 (1940); Flaccus v. Wood, 260 Pa. 161, 103 A. 549 (1918); Shepley v. Lytle, 6 Watts 500 (1837); General Mills, Inc. v. Snavely, 203 Pa. Super. 162, 199 A. 2d 540 (1964); Cockcroft v. Metropolitan Life Ins. Co., 125 Pa. Super. 293, 189 A. 687 (1937). Accordingly, the general words of the release will not be construed so as to bar the

enforcement of a claim which has not accrued at the date of the release. See Henry Shenk Co. v. City of Erie, 352 Pa. 481, 43 A. 2d 99 (1945); Zurich General Acc. & Liab. Ins. Co. v. Klein, 181 Pa. Super. 48, 55-60, 121 A. 2d 893, 896 (1956).

Cady v. Mitchell, 208 Pa. Super. 16, 220 A. 2d 373 (1966), is a recent illustration of the rule mandating strict construction of a release so as to avoid the ever present possibility that the releasor may be overreached. Cf. Wenger v. Ziegler, supra; Henry Shenk Co. v. City of Erie, supra; compare Linda Coal & Supply Co. v. Tasa Coal Co., 416 Pa. 97, 100, 204 A. 2d 451, 453 (1964).

This court cannot be said to differ with Professor Williston's suggestion that "[w]herever a bargain is intended to operate in the future as an exemption from liability the courts apply more stringent rules of interpretation. . . ." Williston, *supra*, § 1826. See, *e.g.*, *Gimbel Brothers, Inc. v. Vanderherchen, Inc.*, — F. 2d — (No. 71-1790, 3d Cir. Oct. 20, 1972); *Davis v. United States Gypsum Co.*, 451 F. 2d 659 (3d Cir. 1971); *Neville Chemical Co. v. Union Carbide Corp.*, 422 F. 2d 1205, 1216 (3d Cir. 1970). Moreover, it cannot be said that we would follow a rule contrary to that of Pennsylvania which mandates strict construction of a release.

This is not to suggest, however, that where there is specific, as distinguished from general, language, in an instrument, or under circumstances where the intent of parties is clearly demonstrated, that we would not give full force and effect to a release which operates as an absolute bar to recovery. We hold merely that under the circumstances presented to the referee, he should have found the language to be ambiguous. And, recognizing the principle that ambiguous language will be resolved against the author thereof, and mindful of the desirability of strict con-

struction of a release from claims not yet accrued or matured, the referee should have allowed Fellows' claim as a general, unsecured creditor.

The order of the district court, affirming disallowance of the claim, will be vacated and the proceedings remanded to the district court, with a direction of a further remand to the referee with other direction that the claim of Fellows be honored as a general, unsecured creditor.

ADAMS, *Circuit Judge*, Dissenting

I respectfully dissent from the conclusion reached by the majority in this case because it is based, I believe, on an unrealistic appraisal of the situation.

The Fellows Gear Shaper Company (Fellows), appellant here, had contracted with F. H. McGraw & Co., general contractors, for the erection of a building in Springfield, Vermont. Upon McGraw's entry into receivership, Fellows became concerned about the possibility of delays and sought an arrangement which would permit Fellows to complete the building. An agreement was entered into between Fellows and the receiver which would achieve this end. The agreement was made effective by an order of the referee in bankruptcy. This order, embodying the agreement, provided that in exchange for a release by the receiver, Fellows could immediately undertake completion of the building, would not be liable to the assertions by the debtor of its right to complete construction, and that the debtor would assign to Fellows its interest in contracts with its laborers and materialmen. The order further provided as follows:

> "And it is further ordered and decreed that Philip F. Newman, Esq., receiver herein, shall not be liable for any claim for deficiency if the costs of completion of the contract exceed the balance of the contract price."

At the time this order was issued, pursuant to the agreement entered into between Fellows and the receiver for McGraw, it was assumed by both that Fellows' cost to complete the building would not exceed the contract price. However, the cost of building did, in fact, ultimately surpass the contract price. Fellows now seeks to assert this excess amount as a claim against the bankrupt company. The receiver, who by the time of this proceeding had been elected trustee, on the other hand, contends that the agreement and release preclude Fellows from asserting such a claim.

Fellows argued to the referee, to the district court, and to this Court, that the disputed release provision should not be deemed to release McGraw from McGraw's liability under the construction contract for any costs over the contract price. The arguments by Fellows have been, at various times, that (1) the provision was inserted into the order unilaterally, (2) the provision was intended to release only the receiver from personal liability and not to release McGraw, and (3) the provision is ambiguous and, therefore, to be interpreted against the released party. The referee rejected Fellows' contentions and held (1) that because Fellows had knowledge of the clause in question and had neither sought review nor modification of the order it was bound thereby and could not now claim that it had been unilaterally inserted; (2) that it could reasonably be believed that the release was intended for the benefit not only of Philip F. Newman, Receiver, but for the debtor, McGraw as well; and (3) that there was only one reasonable interpretation that could be given to the release language.

The district court, holding that the findings of the referee must be accepted unless clearly erroneous, affirmed the findings.

The standard to be applied by this Court in reviewing an order of a referee, affirmed by the district court, has been stated to be:

> "If the debt is ascertained to be not duly proved, or to be without lawful existence, the referee shall disallow the claim. His findings, if based on conflicting evidence, and particularly if involving questions of credibility, should not be disturbed upon review by the district judge unless clearly erroneous. Upon appeal to the circuit court of appeals this presumption of correctness is strengthened where the district judge has approved such findings, and they will be accepted unless a mistake is clearly shown." 3 Collier on Bankruptcy, § 57.14(5) p. 219-20 (14th ed.).

Nevertheless, the majority in this case reversed the district court's affirmance of the referee's ruling. Instead, the majority held that "under the circumstances presented to the referee, he should have found the language to be ambiguous. And, recognizing the principle that ambiguous language will be resolved against the author thereof, and mindful of the desirability of strict construction of a release from claims not yet accrued or matured, [he] should have allowed Fellows' claim as a general unsecured creditor."

I differ from both the approach taken by the majority and the result reached. It would appear that the majority has reviewed the referee's findings not from the point of view that the findings ought not be overturned unless no reasonable basis existed, but rather as if they were viewing the case *de novo*.

Moreover, business realities would indicate that the result reached by the referee is an eminently reasonable interpretation of the provision of the order, or release, in

question. An experienced receiver, participating in a transaction of the kind involved here, would be concerned not only with protecting himself from personal liability but more importantly, with protecting the debtor company from any potential claims. Indeed, the majority seemingly acknowledges that such is a reasonable interpretation, when they state that they do not agree with an interpretation of the provision as releasing the receiver from personal liability only. In addition, a failure by the receiver to secure such protection for the debtor while obtaining such protection for himself might raise serious questions regarding the receiver's administration of the debtor's estate, because it would appear that his concern with his own liability was greater than his concern for the interests of the creditors.

The referee, a most experienced official, extremely conversant with bankruptcy proceedings, orders and forms, did not find the ambiguity claimed by the majority. Rather, he found that the provision in question was intended to release both the receiver and the debtor, McGraw, from all claims. That order was affirmed by the district court and, in turn, I would affirm the district court.

OPINION OF DISTRICT COURT.

LUONGO, *J.* JUNE 28, 1971

This matter is before the court on a Referee's Certificate of Review. The Referee sustained objections by the Trustee in Bankruptcy to a proof of claim filed by Fellows Gear Shaper Company in the amount of $1,092,251.01 and disallowed the claim, with leave to Fellows to file an amended proof of claim for reimbursement for certain expenditures not here material.

BACKGROUND.

On July 29, 1968, Fellows Gear Shaper Company (Fellows) entered into a contract with F. H. McGraw Company (McGraw or Debtor), a building contractor, for the construction of certain buildings for Fellows in Springfield, Vermont, for the contract price of $5,165,851. On December 12, 1968, McGraw filed a Petition for an Arrangement under Chapter XI of the Bankruptcy Act. Philip F. Newman was appointed Receiver and was empowered "to operate, manage and conduct the business" of McGraw. Shortly after the Petition was filed, counsel for Fellows and counsel for the Receiver conducted negotiations with the view of permitting Fellows itself to complete the performance of the construction contract. While that was going on, Fellows gave the Receiver notice of termination of the contract. As a result of the negotiations, a petition for authority for the Receiver to permit Fellows to make direct payments to McGraw's "on site" employees, to subcontractors and to material suppliers and for the Receiver to waive notices of default was submitted to the Referee for approval. On January 21, 1969, an Order[1] was entered

1. See Appendix for full text of the Order.

granting the authority requested. The order contained the following provision:

> "AND IT IS FURTHER ORDERED AND DECREED that Philip F. Newman, Esq., Receiver herein, shall not be liable for any claim for deficiency if the cost of completion of the contract exceeds the balance of the contract price."

A copy of the Petition and Order was mailed to counsel for Fellows on the day the Order was signed. It was received and read by counsel for Fellows. On or about January 24, 1969, Fellows asked for and obtained from the Receiver a letter implementing the terms of the Order. During the ten day period provided under the Bankruptcy Act [11 U. S. C. § 67(c)], Fellows filed no objection to the Order and made no attempt to seek either modification or review of the Order.

At the time of the filing of the Petition with the Referee, both Fellows and McGraw expected that the construction would be completed at a cost less than the contract price. As events turned out, according to Fellows' Proof of Claim, the cost to complete the construction exceeded the contract price by $1,092,251.01, the sum which Fellows seeks to assert as an unsecured claim in the bankruptcy proceedings.[2]

DISCUSSION.

Fellows takes issue with the Referee's ruling that the above quoted provision of the January 21, 1969 Order released the Debtor of liability for excess cost to complete the contract. It argues that the Receiver, by seeking the January 21 Order, assumed the executory contract between Fellows and McGraw and that the release provision of the

2. On February 6, 1970, McGraw was adjudicated a bankrupt and Philip F. Newman was appointed Trustee in Bankruptcy.

Order was intended only as a release of Fellows' right to claim the excess cost to complete as an expense of administration, or alternatively, that it may have been intended to relieve Philip F. Newman of personal liability under 28 U. S. C. § 959(a).

The Referee conducted a hearing on the objections to the claim. He found that the Receiver had not assumed the contract. He found further that Fellows had terminated the contract and that the Receiver had assented to the termination under a settlement agreement wherein the Receiver waived certain notice requirements, waived the right to cure defaults and complete the contract, and agreed to assign Debtor's interests in contracts with laborers and materialmen in return for a release of liability for the Debtor.

The Referee concluded that since the Receiver had not assumed the Fellows contract, the only liability to which the release provision of the Order could have been applicable was the liability of the Debtor for damages for failure to complete the contract.

The findings of the Referee must be accepted unless they are clearly erroneous. *In re Steiker*, 380 F. 2d 765 (3d Cir. 1967); *In re Wolf*, 165 F. 2d 707 (3d Cir. 1948). If there is support in the record for the Referee's ultimate finding, it should not be disturbed even if the reviewing court might have reached a different result. *In re Steiker, supra; In re Arbycraft*, 288 F. 2d 553 (3d Cir. 1961).

There is ample support in the record for the Referee's finding that Fellows agreed to release the Debtor from liability for any excess cost to complete the construction. It appears that Fellows was anxious to proceed without delay to complete the construction of its buildings, particularly because of the danger of weather damage. Both Fellows and the Receiver believed that the contract could and would

be completed at a profit. It was perhaps for that reason that Fellows assented to the inclusion of the release provision in the January 21 Order. Be that as it may, even if there had been no specific prior agreement to a release of liability for the Debtor, there was, at the very least, an acquiescence by Fellows to the release as a condition to the Referee's approval of the agreement between the parties. Fellows received a copy of the Order as soon as it was signed, yet made no attempt to seek clarification, modification or review of the Order despite its clear language. The explanation by Fellows' then counsel, that he made no objection because he regarded the provision in question as releasing only a claim for cost of administration; is not persuasive and it is not the least surprising that the Referee did not accept it.

Present counsel's alternative explanation is no more persuasive. He urges that the release "extended only to the Receiver, as a named individual. It did not extend to the debtor's estate generally, or to the office (as opposed to the person) of the receiver." (Fellows' brief, p. 7). Counsel opines that the provision was inserted to protect Mr. Newman personally from litigation which might have been brought against him pursuant to 28 U. S. C. § 959(a), which provides:

> "§ 959. Trustees and receivers suable; management; State law
>
> (a) Trustees, receivers or managers of any property, including debtors in possession, may be sued, without leave of the court appointing them, with respect to any of their acts or transactions in carrying on business connected with such property. Such actions shall be subject to the general equity power of such court so far as the same may be necessary to the ends of justice,

but this shall not deprive a litigant of his right to trial by jury."

This explanation is based on a misconception of § 959(a). The only purpose of that section is to make such persons appointed by the court amenable to suit without permission of the appointing court [see *Gableman v. Peoria, D. & E. Ry. Co.*, 179 U. S. 335 (1900); *Barber v. Powell*, 135 F. 2d 728 (4th Cir.), *cert. denied*, 320 U. S. 752 (1943)], not to impose personal liability for acts performed in the management of the estate within the receiver's authority. See 1 Collier, *Bankruptcy*, ¶ 2.30, ¶ 2.36.

The Referee's findings have ample support and his legal conclusions are sound. The Referee's order of November 5, 1970 sustaining the Trustee's objections to Fellows' proof of claim will be affirmed.

ORDER.

This 28th day of June, 1971, upon consideration of Referee's Certificate of Review, briefs submitted and argument thereon, it is

ORDERED that the Referee's Order of November 5, 1970 sustaining Trustee in Bankruptcy's Objections to proof of claim of Fellows Gear Shaper Company is AFFIRMED.

ALFRED L. LUONGO, *J.*

REFEREE'S OPINION AND ORDER SUR TRUSTEE'S OBJECTION TO PROOF OF CLAIM NO. 478 OF FELLOWS GEAR SHAPER COMPANY.

STATEMENT OF THE FACTS.

This issue arises on the objections of the Trustee to the claim of Fellows Gear Shaper Company (Fellows) in the bankruptcy of F. H. McGraw & Company (Debtor), a building contractor. On December 12, 1968, Debtor filed a Petition for an Arrangement under Chapter XI of the Bankruptcy Act. At that time, Debtor was engaged in the construction of a number of large buildings including a plant facility for Fellows costing $5,165,851.00 in Springfield, Vermont (Trustee's Exhibit #5). After McGraw entered into the Chapter XI proceedings, Fellows approached the Receiver, Philip F. Newman, Esq., in an effort to induce him to permit Fellows to take over the completion of the construction of its plant. Fellows was anxious to have its new plant facility completed as soon as possible because there was grave concern that the construction might suffer weather damage if the premises were not winterized promptly. Fellows wanted three concessions from McGraw. These were: (1) a waiver of the provisions of the building contract which would require Fellows to give thirty days' notice of its intent to declare debtor in default and take over completion; (2) a waiver of any right which Debtor might have to complete construction in the Chapter XI proceedings, and (3) to succeed to all of Debtor's rights under its subcontracts with its laborers and materialmen. Fellows needed these three concessions in order to take over the completion of the work without delay. At that time, it appeared that the contract could be completed at a profit (Trustee's Exhibit #5), which Fellows agreed would inure to the Debtor. (See Par. 6 of Petition, Trustee's Exhibit #5.)

Fellows was represented by Alban J. Parker, Esq., its general counsel, in these negotiations. The Receiver was represented by his counsel, Alexander B. Adelman, Esq. Apparently, the parties quickly reached an agreement. In exchange for a release, the Receiver would (1) waive the thirty days' notice requirement, (2) waive Debtor's right to complete construction and (3) assign Debtor's interests in its contracts with its laborers and materialmen. The agreement evidenced by the petition approved January 21, 1969, preserved the benefit of any profit to the Debtor.

In order to obtain Court approval of this settlement, it was decided to draft a form of petition and order to be submitted to the Court. On January 3, 1969, in response to a telephone request from Mr. Parker (N. T. p. 20), Mr. Adelman sent to Mr. Parker, who wanted to draft the petition, a form of petition used in another and similar situation in these proceedings which was the 195 Broadway Corporation Petition and Order (Trustee's Exhibit #2). Mr. Parker prepared a draft of a petition which was based, in part, on the 195 Broadway Corporation Petition and Order and sent this to Mr. Adelman on January 15, 1969 (N. T. p. 23).

The form of petition presented to the Court in the Fellows case contained two significant provisions which were not included in the 195 Broadway Corporation Petition. Paragraph 6 of the Fellows Petition included a statement to the effect that the job would be completed not only without loss, but also at a profit for the Debtor. Paragraph 6 reads as follows:

> "That your petitioner is informed, believes and therefore avers that if the contract set forth above is completed, it is anticipated there will be monies available for the debtor and that it would be advantageous to all parties in interest to allow Fellows Gear Shaper Company to continue construction of its factory in whatever manner Fellows deems desirable".

No similar thought was expressed in the 195 Broadway Corporation Petition.

In addition, the form of Order presented to the Court provided for a form of release which was not contained in the 195 Broadway Corporation Petition, as follows:

> "And It Is Further Ordered and Decreed that Philip F. Newman, Esq., Receiver herein, shall not be liable for any claim for deficiency if the cost of completion of the contract exceeds the balance of the contract price."

There was no mention of a release in the 195 Broadway Corporation Petition and Order. A certified copy of the Fellows petition and the order containing the release was mailed to Mr. Parker by Mr. Adelman on the day it was entered (N. T. p. 25). Mr. Parker acknowledged receipt of the aforesaid copy of the petition and the order (N. T. p. 43).

The Debtor was adjudicated a bankrupt on February 6, 1970. Fellows completed construction at a claimed loss to itself of $1,092,251.01, which it now claims as an unsecured claim in these bankruptcy proceedings. This claim is resisted on the ground that McGraw's Receiver bargained for and received a release of any claim of Fellows in exchange for the three concessions recited. As a result of these concessions, Debtor effectively gave up its right to complete the work. This is significant when seen in light of the Zorn Report (Trustee's Exhibit #9), a survey which showed that construction should be completed at a profit on the original contract price.

QUESTION INVOLVED.

Does the Referee's Order of January 21, 1969, granting the Receiver's Petition to permit Fellows to complete the contract which contained, inter alia, the clause: "And it is

further ordered and decreed that Philip F. Newman, Esq., Receiver herein, shall not be liable for any claim for deficiency if the cost of completion of the contract exceeds the balance of the contract price", prevent Fellows from recovering from the Bankrupt Estate an alleged deficiency caused by its completion of the contract?

DISCUSSION.

There are no factual problems involved herein—only the construction to be given to the Referee's Order of January 21, 1969.

Both Fellows and the Receiver were under the impression that the completion of the contract by Fellows would result in a profit (Trustee's Exhibit # 6). No one visualized a loss in this transaction.

Fellows received a certified copy of the order promptly after its entry (N. T. p. 43), did not question it nor seek either a modification of the order by the Referee or a Certificate of Review to contest the validity of the same. Whether the Receiver could have completed the contract and made a profit thereon is conjectural. The Receiver was relieved of liability by the agreement, waived his contractual rights and Fellows is estopped to deny the plain meaning of the release.

There is no testimony in the record that the Receiver assumed the contract or participated with Fellows in its completion. Fellows terminated the contract (Par. 3 of the Petition upon which the order was entered, and Trustee's Exhibit #4), and the Receiver assented to this termination. Accordingly, there could be no executory contract for the Receiver to reject. (See Collier 14 Ed., Vol. 8, pp. 225 and 226.)

The release must be deemed to be applicable to the only liability which survived and that was the possibility of a

claim for damages by Fellows caused by its completion of the contract.

The Trustee has called the Court's attention to the fact that Fellows made some payments not exceeding $44,000.00 for pre-bankruptcy liabilities of the Debtor to laborers and materialmen under subparagraphs (a) and (b) of the order. If this is so, Fellows should be allowed to file an amended Proof of Claim to cover the same, subject however to the Trustee's counterclaim.

The release must be given its plain meaning; the amended Proof of Claim of Fellows is denied and the Trustee's objections to the same are hereby sustained. An appropriate order will be entered accordingly.

FINDINGS OF FACT.

1. On December 9, 1968, F. H. McGraw & Co. (Debtor), filed with the United States District Court for the Eastern District of Pennsylvania a Petition for an Arrangement under Chapter XI of the Bankruptcy Act.

2. Pursuant to said Petition, Philip F. Newman, Esq., was appointed Receiver with authority to operate the business of the Debtor.

3. At the time of the filing of said Petition, Debtor was engaged in the construction of a factory in North Springfield, Vermont, for the Fellows Gear Shaper Company (Fellows) pursuant to a contract dated August 9, 1968, for the sum of $5,165,851.00.

4. The construction at the time of bankruptcy was estimated to be 55% completed (Trustee's Exhibit #9).

5. Upon receipt of notice of the Chapter XI proceedings, Fellows, by its counsel, Alban J. Parker, Esq., requested the Receiver, by his counsel, Alexander B. Adel-

man, Esq., to (a) petition the Court to approve a release of Debtor's right to complete the contract; (b) assign to Fellows Debtor's subcontracts with its laborers and materialmen; and (c) waive the Debtor's rights under the 30-day notice clause of default so that construction could proceed expeditiously.

6. The Receiver agreed to file said petition upon the consideration that the Debtor would not be liable for any deficit with respect to the completion of said contract and that the Debtor would benefit to the extent that profit resulted therefrom.

7. On January 3, 1969, Counsel for the Receiver sent to Counsel for Fellows, at his request, a form of petition (the 195 Broadway Corporation Petition), which was to serve as a model for the preparation of the petition in the present matter (Trustee's Exhibit #1).

8. On January 15, 1969, Counsel for Fellows wrote to Counsel for the Receiver enclosing a proposed form of petition (Trustee's Exhibit #3).

9. On January 21, 1969, Counsel for the Receiver filed a petition with the Court and the Court entered the order attached thereto (N. T. p. 25).

10. The petition presented to the Court was substantially the same form as the 195 Broadway Corporation petition except for paragraph 6, which reads:

> "That your petitioner is informed, believes and therefore avers that if the contract set forth above is completed, it is anticipated there will be monies available for the Debtor and it would be advantageous to all parties in interest to allow the Fellows Gear Shaper Company to continue construction of its factory in whatever manner Fellows deems desirable" (Trustee's Exhibit #5).

11. The form of order entered by the Court on January 21, 1969, included the following pertinent language:

> "And it is further ordered and decreed that Philip F. Newman, Receiver herein, shall not be liable for any claim for deficiency if the cost of completion of the contract exceeds the balance of the contract price" (Trustee's Exhibit #5).

12. Fellows by its counsel received and read a certified copy of the petition and order promptly after its entry on January 21, 1969 (N. T. pp. 30 and 43).

13. Fellows made no objection in respect of the order or petition, either formally or informally, and did not communicate with the Referee, the Receiver or the Receiver's Counsel with respect to the terms of the petition or order (N. T. p. 47).

14. In reliance upon the petition and order, the Receiver gave up (a) his right to complete the contract, (b) his right to have a 30-day notice of the alleged default, and (c) assigned the Debtor's subcontracts with its laborers and materialmen (Trustee's Exhibit #5).

15. Fellows completed construction of its industrial plant taking the benefit of the Receiver's waivers of his right to complete construction, the Debtor's subcontracts with its laborers and materialmen and his time to cure any default of the contract.

16. Fellows gave no notice during the progress of construction that the anticipated profit for the Debtor would not materialize and that on the contrary a loss would result.

17. On February 6, 1970, the Debtor was adjudicated a bankrupt and Philip F. Newman, Esq., was appointed Trustee.

18. Before the Debtor was adjudicated bankrupt, on June 6, 1969, Fellows filed a Proof of Claim No. 250, which was amended by No. 398, filed October 28, 1969, and later by No. 478 in the sum of $1,092,251.01, which was filed July 27, 1970.

19. On June 24, 1970, the Trustee in Bankruptcy, by his Counsel, objected to the allowance of Claim No. 398 (later amended by Claim No. 478) on the grounds that said claim was released by Referee's Order of January 21, 1969, and that Fellows terminated the executory contract on January 13, 1969 (Trustee's Exhibits Nos. 4 and 5).

CONCLUSIONS OF LAW.

1. The construction of a judicial order is a matter of law and is to be decided by the Court.

2. The language employed in a judicial order should be given its plain meaning.

3. Where the terms of a judicial order are susceptible of more than one interpretation, the Court should adopt that interpretation which appears most reasonable under the circumstances at the time of the entry of the order.

4. Under well-established principles of law, the Receiver would have no personal liability or cost of administration liability with respect to any default by the debtor of its contract with Fellows or with respect to any deficiency if the cost of completing the contract exceeded the contract price. Therefore, the only reasonable meaning that can be given to the release language in the order is that the release inured to the benefit of the Trustee following adjudication.

5. Where a party has only one claim and that claim arose out of the alleged breach before bankruptcy of a contract by the debtor, then a release thereafter given to the

Debtor's Receiver in the Chapter XI proceedings prior to the adjudication in bankruptcy extinguished that claim.

6. Fellows sought neither review nor modification of the order within ten days as required by Section 39 of the Bankruptcy Act and accordingly is bound thereby.

7. The order entered in these proceedings on January 21, 1969, effectively extinguished any claim which the Fellows Gear Shaper Company had under its construction contract with the debtor. In the event Fellows made payments to laborers and materialmen of any pre-bankruptcy obligations due by the bankrupt for work performed for the amount of such charges may be recovered by Fellows upon amendment of its Proof of Claim.

THOMAS J. CURTIN,
Thomas J. Curtin,
Referee in Bankruptcy.

Dated: November 5, 1970

ORDER OF REFEREE.

And Now, to wit, this 5th day of November, 1970, upon the consideration of Proof of Claim No. 478 of Fellows Gear Shaper Company, the objections thereto and after hearing and argument thereon, it is

Ordered and Decreed that

(1) Claims Nos. 250 and 398 are both hereby dismissed since they are amended by Claim No. 478; and Claim No. 478, filed in the sum of $1,092,251.01, is disallowed.

(2) However, leave is granted to the Fellows Gear Shaper Company to file an amended Proof of Claim restricted to claims in the nature of subrogation for payments made by Fellows to pre-bankruptcy creditors of F. H. McGraw and Company, bankrupt, for work performed or material supplied covered by previous progress payments made by the Fellows Gear Shaper Company to the bankrupt, and it is

(3) Ordered and Decreed that further proceedings herein be limited to claims arising under Section 2 of this Order and the Trustee's Counterclaim to the Proof of Claim of Fellows Gear Shaper Company.

Thomas J. Curtin,
Thomas J. Curtin,
Referee in Bankruptcy.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 71-1900.

IN THE MATTER OF
F. H. McGRAW & COMPANY, BANKRUPT

FELLOWS CORPORATION, CLAIMANT,
Appellant

(D. C. No. B-30869 IN BANKRUPTCY)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: ALDISERT, ADAMS and GIBBONS, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted on briefs.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed June 28, 1971, which order affirmed disallowance of the claim, be, and the same is hereby vacated, and the proceedings remanded to the said District Court, with direction to further remand to the referee with direction that the claim of Fellows be honored as a general, unsecured creditor, in accordance with the opinion of this Court.

ATTEST:

THOMAS F. QUINN,
Clerk.

February 9, 1973.